Supreme Court, U.S.
FILED
MAR 14 2005
OFFICE OF THE CLERK

No. 04-1053

In the

Supreme Court of the United States

KENNETH ALLEN GOLDBLATT

Petitioner,

v.

A&W INDUSTRIES, INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Frank P. Hernandez
Counsel of Record
716 Wayne Avenue
Dallas, Texas 75223
(214) 821-1213
(214) 821-1214 (Fax)
E-mail: fgeagle@aol.com
TCB# 09516000
Attorney for Petitioner

TABLE OF CONTENTS

Page(s)

Table of Contents i
Table of Cited Authorities iii
Reply 1
The *Chutzpah* Issue 1
Argument Without Anchor 2
Conclusions Without Facts 3
Erroneous and Misleading Legal Interpretation 4
The "By the Debtor" Inquiry 4
The "Correct" Legal Standard 5
Issue Preclusion 7
The "Legal" Difference 8
Certificate of Service 12

THIS PAGE LEFT INTENTIONALLY BLANK

TABLE OF CITED AUTHORITIES

Federal Cases **Page(s)**

Commissioner v. Sunnen.....9
333 U.S. 599 (1948)
Chaffee v. Kraft General Foods. Inc. 2
886 F.Supp. 1164 (D.N.J.,1995).
Dennis v. Dennis (In re Dennis) 10
25 F.3d 274 (5th Cir. 1994).
Faulkner v. National Geographic Enterprises Inc. 9
04-0263 (2nd Cir. 03/05/2005).
Kawaauhau v. Geiger.....8, 9
523 U.S. 57, 118 S.Ct. 974,
140 L.Ed.2d 90 (1998)
Miller v. J. D. Abrams, Inc. (In re Miller).....7, 8
156 F.3d 598 (5th Cir.1998), cert. denied,
526 U.S. 1016, 119 S.Ct. 1249,
143 L.Ed.2d 347 (1999)

Texas Cases

Avary ex rel. Estates of Bourgeois v. Bank of America, N.A. 7
2002 WL 442064 (Tex.App.Dallas, 2002)
In re J.L......7
127 S.W.3d 911 (Tex.App. 2004)
Jernigan v. Wainer.....7
12 Tex. 189 (1854)
Joske v. Irvine 7
91 Tex. 574, 44 S.W. 1059 (1898)
Lobley v. Gilbert 7
149 Tex. 493, 236 S.W.2d 121 (1951).
Rounsaville v. Bullard 7
154 Tex. 260, 276 S.W.2d 791(1955)

Tex. Nat'l Bank v. Karnes 4
717 S.W.2d 901, 903 (Tex. 1986))

Treatises

'No Evidence' and 'Insufficient Evidence,' 7
38 Texas L. Rev. 359

Statutes

U.S. Bankruptcy Code §523(a)(6) ..... *passim*

REPLY

A&W has come to a forum in which ultimate and momentous decisions turn on minute facts and delicate shades of the meanings of words and asks the Court to disregard the flagrant errors of the courts below by cobbling together misleading allegations and unsupported conclusions. Its "take our word for it" argument is unworthy of serious consideration by this Court.

The *Chutzpah* Issue

A&W claims Goldblatt's "legal justification" arguments are "the epitome of *chutzpah*" – without seriously addressing them. Instead, it makes much of the fact that A&W paid $325,000.00 for business assets.[1] [E, 32].[2] What it does not say is that A&W was ***never*** a *bona fide* purchaser for value as shown by the original trial record and documents before the Court. [E, 27-28]. Testimony at trial showed that a competing bidder would have paid *$1.8 million* for assets if the Estate's and WNT's employees and fiduciaries had not colluded to keep them from making their offer. [E, 29, 35-36]. But most important, A&W's principals testified at trial that they were aware of the dispute concerning the company's ownership and real estate at the time they purchased them. E, 64 (fn.7), 66, and 78]. Now they would have the Court believe that the efforts by the Estate's executors to recover their looted assets were conspiratorial and without justification. The record shows otherwise.

In defining *chutzpah* in the context of American jurisprudence it is important to note, as a court in the federal district of New Jersey did in 1995, that "Legal

---

[1] In actual fact, A&W's principals paid only $25,000.00 each, borrowing the balance which was paid out of the profits of the business.

[2] In the interest of space, all citations to appendices are cited as "[appendix letter, page number(s)]"

chutzpah is not always undesirable, and without it our system of jurisprudence would suffer." *Chaffee v. Kraft General Foods, Inc.*, 886 F.Supp. 1164 (D.N.J.,1995). That is particularly true in this case, in which significant public policy issues reverberate.

Argument Without Anchor

A&W recites "facts" without placing them within any chronological context.

It is true that the Executors refused to sell the subject real estate to A&W in November, 1993. [E. 36]. It is unstated that A&W had ceased making rental payments and was forcing the property into foreclosure prior to that time. [E. 37]. It is untrue that Goldblatt had anything to do with the Executors' decision, since he was not involved in any way until February, 1994.

It is true that Shirley Long Day sued the Executors in the 48th District Court in January 1994 for breach of the Agreed Judgment in the 352nd District Court (of December 1992). [E. 37] It is not true that Goldblatt was a party to either lawsuit, or had anything to do with either action, and met Shirley Long Day only in April 1994 when he began to arrange the family settlement agreement[3] that resulted in the May 30 Agreement(s).

A&W fails entirely to mention that it sued Goldblatt in 141st District Court on March 27, 1994 [E. 38], after he had purchased the mortgage note but before he had met Shirley Long Day or any other participant in the May 30, 1994 Agreement or made any investigation of the WNT asset sale that he found to be so flawed that both attorneys representing the executors and WNT and WNT's

---

[3] It is noteworthy that the state appeals court rejected Goldblatt's claims that the May 1994 Agreement was a Family Settlement Agreement because "none of the parties to the May 1994 agreement were beneficiaries of Tommy's will." In fact, documents before that court showed that every adult heir ratified the Agreement with notarized signature and each had a financial stake in the outcome.

CPA paid the limits of their malpractice insurance policies before the end of trial. Once he discovered that A&W was not a *bona fide* purchaser for value of the assets and that the Estate's and WNT's fiduciaries were apparently liable for malpractice claims, he proceeded in his own defense. A&W would have this Court believe that he is not permitted to do so. Was he simply to capitulate to A&W rather than establish a vigorous defense to which he is obviously entitled?

No reasonable person would contend that facts exist outside their chronological context. Yet that is precisely what A&W would have this Court believe. "What did he know and when did he know it?" is as valid an inquiry for this case as it was for one with much broader historical implications.

Conclusions Without Facts

This entire case rests on a hopelessly flawed trial court judgment that decreed "conspiracy" without finding an essential element required by law to do so. In Texas, a civil conspiracy must include an illegal act by a conspirator. A&W would have this Court believe that an apparently false statement by Shirley Long Day in an affidavit supporting her summary judgment motion in the 48th District Court constitutes a fraud on that court. No judicial decree exists finding that to be true. Instead, the state appeals court said "*If* this was the case, her allegations of damages in the 48th court lawsuit were completely false." [emphasis added] [E, 52]. But in the *same* Opinion recognized that the trial court had never declared the 48th court judgment void as it surely would have done if it had declared it to be a fraud on the court. [See E. 92 (fn. 17)]. The Opinion simply declared that "While A&W may not have had standing to challenge the effect of the 48th court judgment on the parties to that lawsuit, it could certainly assert below that it was not bound by the 48th court judgment." [E, 96 (fn. 18)]. If A&W was not "bound," A&W could not be "damaged."

The state appeals court had similar problems affirming the judgment when it was forced to "imply" findings that were not made by the trial court. [E, pp. 60, 62, 80, 81 and 111. See also 130]. Such action is not permitted of a Texas appeals court that can only "unfind" facts, not find them. But, the appeals court misquoted the very authority it was citing ("Courts of Appeals can only 'unfind' facts, not make original findings of fact, and exceeds its authority when it implies a finding of actual damages in tort." *Tex. Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986)) by omitting the final compound phrase. Perhaps that is why it ordered its Opinion to remain unpublished. [See E, 90.]

Erroneous and Misleading Legal Interpretation

A&W makes no substantive legal analysis of the case law, but simply argues that the Court should not consider the substantive points of law and legal theories Goldblatt's Writ has raised.

The "By the Debtor" Inquiry

A&W's position is both inconsistent and confusing with regard to the Bankruptcy statute which it encourages the Court to disregard. A&W makes no mention of the fact that it judicially admitted in its Plaintiff's Response to Defendant's Motion for Summary Judgment with Cross Motion for Summary Judgment and Supporting Affidavits in the Bankruptcy Court that it "has never claimed that the defendant [Goldblatt] engaged in either negligent, unlawful or criminal behavior." [G, 116]. Its entire argument holds Goldblatt responsible for the alleged acts of others –acts that rest at best on tenuous legal grounds.[4]

Goldblatt has pointed out to the Court that no Federal case has ever held a co-conspirator liable under 523(a)(6) unless there was specific evidence of the

---

[4] See E, 80. See also E, 63: The trial court did not conclude that Goldblatt . . . breached the obligation to purchase agreement."

debtor's actual participation in a willful and malicious act. A&W has failed to provide a single controverting case to this argument. Instead it rails about state law requirements and applications that are inapposite to this inquiry.

Similarly, A&W's claim that "the circuit court of appeals reviewed the entire record before it" is misleading and unsupportable. [Appendix M, p. 151]. The one paragraph, *per curiam*, unpublished Opinion makes no such statement.[5]

So far, A&W has been successful at asking the courts below to impute the actions of others to Goldblatt, and they have erroneously done so. It is for this Court to correct these obvious errors.

The "Correct" Legal Standard

Similarly, A&W asks the Court to assume Goldblatt's actions in the absence of any proof on the record. "Must have", "could have", "should have" are not elements of any standard of proof required under 523(a)(6). There is no question that Goldblatt took actions: to purchase a note that was available in the marketplace and predated A&W existence, to protect himself from A&W's precipitously filed lawsuit of March 1994, to protect his investment, and to investigate the claims of A&W's lawsuit. None of those actions were (or are) illegal. None were intended to harm A&W nor were directed toward intentionally damaging A&W.

A&W wants the Court to forget the single controlling issue of this entire decade of litigation: A&W ***never*** had a right to purchase the real estate. A&W wants the Court to overlook the fact that its contract was contingent upon the lessor obtaining clear title to the property. A&W wants the Court to overlook the state appeals court's recognition that "The record indicates,

---

[5] It is indicative of the confused nature of the jurisprudence of this case that both state and Federal appeals courts withheld publication of their opinions

however, that this cloud was not removed," [E, p. 34 (fn.4)] thus never triggering that contingency.

The Bankruptcy Court correctly concluded that civil conspiracy is an "intentional tort" but failed to analyze its essential nature as a "derivative tort." Civil conspiracy, the Bankruptcy Court recognized, can only be found in conjunction with "one or more overt unlawful acts." [Appendix H, p. 134] See *Avary ex rel. Estates of Bourgeois v. Bank of America, N.A.*, 2002 WL 442064 (Tex.App.Dallas, 2002). "Willful injury" comes from the underlying tort, not from the conspiracy itself. If Goldblatt did not commit the underlying tort (which was not even found by the trial court) he cannot be held non-dischargeable under 523(a)(6).

Misleading Citations to the Record

A&W makes much of what it characterizes as the "findings" of the state trial court and unpublished appeals court Opinion upon which the bankruptcy court relied. In doing so, it consistently attempts to mislead the Court by mischaracterizing the nature of those quotations. To wit:

"Findings, p. 5, ¶ 22" is a Conclusion of Law, and does not mention Goldblatt.

"Findings, p. 5, ¶ 23" is a Conclusion of Law.

"Findings, p. 6, ¶ 23-24" is a Conclusion of Law (particularly unsupported by other actions of the trial court in its refusal to set aside Goldblatt's foreclosure or to grant A&W a constructive trust on the property). The answer is clearly stated in B, p. 9, lines 5-21.

"Findings, p. 6, ¶ 27" is a Conclusion of Law.

"Appendix E, pp. 53-54" illustrates the error of the state appeals court in assuming – in the absence of all evidence – that Goldblatt was a party to the 48th court suit.

"Appendix E, pp. 57-58" demonstrates that inferences were used in place of factual evidence to find conspiracy – an action also impermissible under long-settled Texas law. (We recognize that proof of a conspiracy may be, and usually must be made by

circumstantial evidence, *Jernigan v. Wainer*, 12 Tex. 189 (1854), but vital facts may not be proved by unreasonable inferences from other facts and circumstances, 'No Evidence' and 'Insufficient Evidence.' 38 Texas L. Rev. 359, 363; or, as often been said by this court, a vital fact may not be established by piling inference upon inference. *Rounsaville v. Bullard*, 154 Tex. 260, 276 S.W.2d 791(1955); *Lobley v. Gilbert*, 149 Tex. 493, 236 S.W.2d 121 (1951). To permit proof in this fashion, would violate the rule of *Joske v. Irvine*, 91 Tex. 574, 44 S.W. 1059 (1898), which requires proof of any vital fact by evidence amounting to something more than a mere scintilla.) See *In re J.L.*, 127 S.W.3d 911 (Tex.App. 2004)

Appendix E, pp. 60-61 demonstrates the state appeals court's impermissible reliance upon "implied" findings. Once again, the text of the quotation indicates the actions of others, not Goldblatt.

Appendix E, pp. 80-81 purports to indicate that breach of contract is a ground for upholding a conspiracy allegation. Under Texas and Federal law, it is not, without an additional, specific tortious action, which the state trial court did not find.

Appendix E, p. 59 purports to indicate Goldblatt had "full knowledge of all of the details of the conspiracy" when the record indicates that he was not involved until months after the breach of contract upon which all other allegations were based. [See E, p. 63 stating that "All appellants conspired to commit the fraud that resulted in the breach" but that "the trial court did not conclude that Goldblatt breached the obligation to purchase agreement."]

Issue Preclusion

A&W makes much of the doctrine of issue preclusion without adequate legal analysis. The fact that 523(a)(6) is a Federal statute, requires that the state findings be reviewed ***in light of*** the Federal statute. See *In re Debtor* (*Miller*), 156 F.3d 598, 48 U.S.P.Q.2d 1293 (5th Cir. 1998) where the panel declined to rest its summary

judgment on §523(a)(6) because the state court jury had not decided whether Miller had inflicted a "willful and malicious injury." The *Miller* panel reasoned that the label "intentional tort" is too elusive to sort intentional acts that lead to injury from acts intended to cause injury. *Kawaauhau*, 118 S. Ct. at 977. The panel avoided equating §523(a)(6) torts and intentional torts, saying ". . . . Merely because a tort is classified as intentional does not mean that any injury caused by the tortfeasor is willful." Yet this is precisely what A&W is asserting to this Court and what the bankruptcy court did.

Because the state court findings did not speak to Miller's fraudulent intent or the objective probability of injury from tortious acts, the panel found the parties were free to try the issue for the first time and reversed and remanded. Identically, the state court findings do not speak to Goldblatt's state of mind and A&W's judicial admission confirms that Goldblatt made no action at all that would sustain objection to discharge under 523(a)(6).

A&W's claim that "the state appeals court clearly held under the facts proved, that Goldblatt's acts were willful and objectively intended to harm the property interest of A&W with malice that was inferred from his conduct" is both logically impossible and factually flawed because it relies upon the breach of contract (in which Goldblatt was not involved in any manner) and the 48th court suit (to which Goldblatt was not a party). A&W wants this Court to ignore its judicial admission that Goldblatt committed no "act" against A&W and to hold him responsible for the acts of others at times prior to when he was involved with them, when that is clearly not the law under 523(a)(6).

The "Legal" Difference

A&W assumes wrongly that the legal bases of collateral estoppel for Texas conspiracy law and Federal bankruptcy law under 523(a)(6) are identical. But Goldblatt's Writ established for the Court that they are not.

Under Texas conspiracy law, co-conspirators can be held liable for the actions of other co-conspirators. But the very language of 523(a)(6) makes an entirely different legal requirement, specifically requiring an act "by the debtor."

This Court's original analysis of the statute in *Kawaauhau* demonstrates the type of analysis required. There it analyzed both the nuance of the language and the intent of Congress in drafting that language to determine that a debtor's conduct must be both willful ***and*** malicious.

Here, a similarly closely-reasoned analysis is required as to whether the drafters intended the "by the debtor" language to include acts of others in whatever context. Goldblatt's Writ has already demonstrated that the federal courts in every circuit in which 523(a)(6) has been considered have concluded that they clearly did not.

There is a seminal difference between the state and Federal laws that precludes collateral estoppel.

This Court spoke to that very issue in *Commissioner v. Sunnen* when it stated that "even where the specified elements of collateral estoppel are present, reexamination of a legal issue is appropriate where there has been a change in the legal landscape after the decision claimed to have preclusive effect." Restatement (Second) of Judgments § 28 (cmt. c). This is particularly so "when . . . . there has been change in the law but not the facts." *Commissioner v. Sunnen*, 333 U.S. 599-600 (1948) as quoted in *Faulkner v. National Geographic Enterprises Inc.*, 04-0263 (2nd Cir. 03/05/2005).

Various cases discussed in Goldblatt's Writ demonstrate the changing (and conflicting) interpretations of 523(a)(6). A&W's risible and disingenuous assertion that this Court need not concern itself with conflicts between other circuits and the 5th Circuit is as curious as it is self-serving. Goldblatt believes that it is precisely the function of this Court to provide "equal justice" by maintaining the consistency of analysis and application of the laws in all circuits.

Goldblatt's Writ amply demonstrates that there are circumstances requiring reversal of the bankruptcy court's exception to discharge. A&W would have this Court believe that the issues are identical when they clearly are not, and that they conform to the teachings of the authorities when they clearly do not. Appeals courts must determine whether the state appellate court "has made specific, subordinate, factual findings on the ***identical dischargeability issue in question*** – that is, an issue which encompasses the same *prima facie* elements as the bankruptcy issue . . . ." [Emphasis added] *Dennis v. Dennis (In re Dennis)*, 25 F.3d 274, 278 (5th Cir. 1994). Clearly, an act "by the debtor" required by 523(a)(6) could not have been found by the bankruptcy court in light of A&W's judicial admission that Goldblatt personally committed no act that could have damaged A&W and the conflicting, flawed and erroneous findings of the state courts.

A&W erroneously claims that this case does not present an issue that is important to the jurisprudence of the United States. In fact, the kernel issue contained in this case is of substantial importance to every circuit. If Goldblatt's debt can be excepted based on the conduct of others, bankruptcy courts will be flooded with bogus "conspiracy" allegations in efforts to obfuscate and avoid the narrow requirements of 523(a)(6) that the act be "by the debtor." In a political climate where debtors have fewer and fewer alternatives for the new start that is the foundation of bankruptcy law, this case, and the implications springing from it, represents an important public policy issue.

Respectfully submitted,

Frank P. Hernandez
Counsel of Record
716 Wayne Avenue
Dallas, Texas 75223
(214) 821-1213
(214) 821-1214 (Fax)
E-mail: fgeagle@aol.com
TCB# 09516000
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Writ of Certiorari with separate Appendix has been served on A&W Industries, Inc.'s Attorney of Record, Mr. Frank R. Jelinek, Esq. at 801 East Abram, Suite 102, Arlington, Texas 76010, on March 14, 2005, via first class mail.

Frank P. Hernandez